8-1901-5516-2
OSHRB Docket No. 3001

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

Kenneth Peterson, Commissioner,
Department of Labor and Industry,
State of Minnesota,

Complainant,

vs.

Nitrochem Energy Corporation,

Respondent.

ORDER_DENYING_MOTIONS
FOR_SUMMARY_JUDGMENT

On May 13, 1991, Patrick J. Roche, Trenti Law Firm, Attorneys at Law, 1000 Lincoln Building, P.O. Box 958, Virginia, Minnesota 55792, filed a Motion for Summary Judgment on behalf of the Respondent. On May 21, 1991, John K. Lampe, Special Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, filed a Memorandum in Opposition to the Respondent's Motion on behalf of the Complainant. On June 11, 1991, the Respondent replied to the Complainant's Memorandum. For purposes of this motion, the record closed at that time.

Based upon all of the files, records and proceedings herein, and for the reasons set forth in the Memorandum attached hereto,

IT IS HEREBY ORDERED: That the Respondent's Motions for Summary Disposition be and they are hereby DENIED.

Dated this 26th day of June, 1991.

_/s/_Jon_L._Lunde_____
JON L. LUNDE
Administrative Law Judge

MEMORANDUM

Between November 3 and December 4, 1989, an Occupational Safety and Health inspection of the Respondent's work site near Biwabik, Minnesota, was conducted by the Occupational Safety and Health (OSH) Division of the Minnesota Department of Labor and Industry. On December 18, 1989, a Citation and a Notification of Proposed Penalty was issued by the Complainant. The Citation charged the Respondent with a violation of the so-called general duty clause in Minn. Stat. Þ 182.653, subd. 2 (1988). The Citation stated, in pertinent part, as follows:

> The company did not develop and implement a minimally acceptable standard operating procedure, such as outlined in the IME Publication No. 21 "How to Destroy Explosives" (1970), for the burning disposal of reject ammonium nitrate based blasting agents, in a comprehensive written format, readily understandable to all personnel, and conduct worker training before any worker was permitted to engage in the burning of reject blasting agents.

For the violation charged, the Complainant proposed a penalty of $10,000.00. On February 7, 1990, a Complaint was issued charging the Respondent with the violation set forth in the Citation and requesting that the proposed penalty be affirmed. The Respondent filed its Answer to the Complaint on February 15, 1990.

On December 27, 1990, the Complainant issued a First Amended Complaint which, in Count II, amended the Citation previously issued on December«18, 1989, to read, in pertinent part, as follows:

> The company did not effectively supervise and enforce a minimally acceptable standard operating procedure, such as outlined in IME Publication No. 21 "How To Destroy Explosives" (1970), for the burning disposal of reject ammonium nitrate based blasting agents.

No change in the initial penalty was made. On January 14, 1991, the Respondent filed its Answer to the First Amended Complaint. In its Answer, the Respondent objected to the citation amendment contained in Count II of the First Amended Complaint. At the suggestion of the Administrative Law Judge, the Respondent's objections to the amended Complaint and Citation were raised in

Motions

The Respondent's first motion requests a an order striking Count II of the First Amended Complaint -- which amends the citation issued on December 18, 1989 -- on the grounds that amendment of the Citation is barred under Minn.

Stat. Þ 182.66, subd. 1, and Minn. Rules, pt. 5210.0530. Minn. Stat. Þ 182.66,
subd. 1, states:

> After an inspection or investigation, if the commissioner believes that an employer has violated a requirement of section 182.653, or any standard, rule or order adopted
>
> > pursuant to this chapter, the commissioner shall, with reasonable promptness and in no event later than six months following the inspection, issue a written citation to the employer by certified mail. The citation shall describe with particularity the nature of the violation, including a reference to the provision of the act, standard, rule or order alleged to have been violated. . . .

Minn. Rule pt. 5210.0530, subp. 1, reiterates this statutory requirement stating that no citation may be issued after the expiration of six months following the occurrence of any alleged violation.

Minn. Stat. Þ 182.66, subd. 1, is patterned after Section 9(c) of the federal Occupational Safety and Health Act which provides that "No citation may
be issued . . . after the expiration of six months following the occurrence of
any violation." Section 9(c) does not prohibit the amendment of citations after six months have passed. The Federal Occupational Safety and Health Review Commission (OSHRC) and the courts have applied Rule 15(c) of the Federal
Rules of Civil Procedure to allow citation amendments to "relate back" to the date of the original citation, overcoming employer objections that any amendment made more than six months after the alleged violation is barred under
section 9(c). 1 See e.g., Southern_Colorado_Prestress_Co._v._OSHRC, 586 F.2d 1342, 1979 OSHD ß 23,247 (10th Cir. 1978). Under the Federal Rules of Civil Procedure, Rule 15(c), the test for determining if a citation amendment relates
back to the date of the original citation is whether the "claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." Rule 15.03, Minn.R.Civ.P., which is patterned after its federal counterpart, contains the same test.

Under federal OSH practice, amendments made in a complaint rather than by
motion are allowed if they do not change the factual allegations in the citation. 1 CCH Employment Safety and Health Guide, paragraph 4569. The Minnesota Occupational Safety and Health Review Board (Board) has not adopted rules specifically authorizing the amendment of a citation after the time limit
for filing a citation has elapsed. However, the rules that have been adopted clearly contemplate such amendments. Minn. Rule pt. 5215.2000, subp. 1C, states in part:

_____

1 A federal OSHA citation may be amended at any time before the contest is concluded if the amendment does not prejudice the employer. The amendment may be made on the complainant's own motion before the citation has been contested merely by the issuance of a new citation. After a notice of contest has been filed, amendments are made by motion of the complainant (Secretary). The complainant may file a motion to amend the charges before, during, or after a hearing, or while the case is on review before the OSHRC. See generally, 1 CCH Employment Safety and Health Guide, ß 4569; Bethlehem_Steel_Corp., 1974-1975 OSHD ß 19,482 (Rev. Com. 1975); Arch_Masonry,_Inc., 1976-1977 OSHD ß 21,392 (Rev. Com. Judge 1976).

> If the commissioner seeks in his complaint to amend his citation or proposed penalty, he shall set forth the reasons for amendment and shall state with

The Respondent's basic ground for striking Count II is that the citation, as amended in Count II, is different factually from the initial citation and must stand on its own footing as a new citation. Because it was issued more than six months following the OSH inspection, Respondent argues that it is barred under Minn. Stat. Þ 182.66, subd. 1. Complainant argues that any amendment to a citation is viewed as if it were made at the time of the citation, citing Simplex_Time_Recorder_Co._v._Secretary_of_Labor, 766 F.2d 575, 585 (D.C.Cir. 1985). It also argues that the amendment is authorized under Minn. Rule pt. 1400.5600, subp. 5. There are several weaknesses in the Complainant's arguments.

First, the authorities it cited do not hold that any citation amendment relates back to the time the original citation was issued. On the contrary, amended citations relate back to the time of the original citation only if the amended citation arose out of the "conduct, transaction, or occurrence set forth or attempted to be set forth in the original citation." See e.g., Southern_Colorado_Prestress_Co., 1979 OSHD at 28,111-28,112. Moreover, the general authorization in Part 1400.5600, subp. 5, which permits an agency to amend its Notice of and Order for Hearing at any time prior to the close of the record, does not authorize amendments barred by a specific statutory provision. Complainant cannot, for example, amend his complaint to add citations or amend citations that are barred under Minn. Stat. Þ 182.66, subd. 1. The rule is subservient to statutory requirements. Amendments to the Notice of and Order for Hearing, including complaint amendments in OSHA cases, must be consistent with governing statutes of limitation.

In determining whether an amendment to an OSHA citation is barred, Rule 15.03, Minn.R.Civ.P. should be followed. Minn. Rules pt. 1400.6600 authorize

the application of the Rules of Civil Procedure for the District Courts when ruling on motions, and the absence of any other authoritative standards on the relation-back of amendments makes application of the civil rules necessary. Applying Rule 15.03 to determine whether the Complainant's amended citation relates back to the date of the original citation has the added advantage of conforming Minnesota OSH practice with its federal counterpart and makes a large body of case law available.

It is clear that the Complainant may amend a citation in its complaint under Minn. Rule pt. 5215.2000, subp. 1C. Respondent has not argued that the Complainant cannot do so, that the procedure followed in amending the complaint or the citation was defective, or that the amended complaint does not set forth the reasons for the amendment. Hence, those matters need not be decided. It is noted, however, that the failure to set forth reasons for amending a citation in the complaint is not fatal if the employer is not prejudiced thereby. Schiavone_Construction_Co., 1977-1978 OSHD ß 21,815 (Rev. Com. 1977); Southern_Colorado_Prestress_Co., supra, 1979 OSHD ß 23,247 at 28,111-28,112. The Respondent has asserted no prejudice with respect to these matters and it has that burden of proof. See e.g., Raspler_v._Seng, 215 Minn. 596, 11 N.W.2d 440, 441 (1943).

The crux of the Respondent's argument is that the amended citation changed the nature of the original citation and that the citation, as amended, must stand on its own footing as a new citation. If it is a "new" citation, it would be barred under Minn. Stat. Þ 182.66, subd. 1. Clearly, therefore, the Respondent's motion is, in essence, that the amended citation does not relate back to the time the original citation was issued under Rule 15.03 Minn.R.Civ.P.

Both the initial citation and the amended citation charge the Respondent with a violation of Minn. Stat. Þ 182.653, subd. 2, and both charge that the "employer failed to furnish to each of his employees conditions of employment and a place of employment free from recognized hazards

In determining whether the amendment is consistent with Rule 15.03, it must be noted that leave to amend is freely given when justice requires under Rule 15.01, Minn.R.Civ.P. Moreover, administrative pleadings are liberally construed and easily amended. Usery_v._Marquette_Cement_Manufacturing_Co., 568 F.2d 902, 906 (2nd Cir. 1977). Amendments that merely seek to change the legal theory underlying a citation are permissible. Southern_Colorado_Prestress_Co., supra, OSHD ß 23,247 at 28,111. The Respondent pointed out that the citation issued by the Complainant arose following a tragic accident on November 3, 1990. The initial citation as well as the amended citation relate to that occurrence. Moreover, the factual allegations, while phrased differently, are the same in substance. The initial citation charged the Respondent with failing to "develop and implement" a minimally acceptable standard operating procedure for the disposal of certain blasting agents. The amended citation

charges the Respondent, instead, with failing to "effectively supervise and enforce" such a minimal standard. This is not a significant change in the factual basis of the charge. The "implementation" of an acceptable standard involves, among other things, supervision and enforcement of the standards developed.

It is true that the amended citation does not charge the Respondent with failing to have its standard in a "comprehensive written format, readily understandable to all personnel" or for failing to conduct worker training before any worker was permitted to engage in the disposal of blasting agents. Nonetheless, the Complainant's decision to delete the failure to train and to adopt a written policy as elements of the charge are immaterial here. In determining whether the amended citation relates back to an initial citation, elements of a charge that are dropped need not be considered. Rather, the focal point should the factual allegations that are retained. In this case, the Administrative Law Judge is persuaded that the claim asserted in the amended citation arose out of the conduct, transaction, or occurrence set forth in the initial citation. Although the failure to "implement" a minimally acceptable procedure for disposing of blasting agents was changed to the failure to "supervise" and "enforce" such a policy, the Administrative Law Judge is persuaded that the change merely expands and amplifies the initial citation and that it does not constitute a new or different citation barred by Minn. Stat. Þ 182.66, subd. 1. Implementation presumes that a policy exists and that steps to effectuate it will be taken; e.g., supervision and enforcement. Consequently, Respondent's Motion to Dismiss should be denied. The Respondent has not alleged any surprise or prejudice and its position is simply too restrictive.

The Respondent also requested an order striking the original citation and complaint. The ground for the motion is that an employer cannot be required under the general duty clause to adopt standards in a comprehensive written format. The motion need not be decided because the citation, as amended, does not charge the Respondent with a violation of the general duty clause for failing to have its standards in a comprehensive written format. The reference to a comprehensive written format was deleted when the citation was amended. Hence, the Administrative Law Judge can ascertain no grounds for striking the original citation.

JLL